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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings**

JAN 18 2011

**Part of
Public Record**

**SOUTH MISSISSIPPI ELECTRIC POWER
ASSOCIATION**

Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Defendant.

Docket No. NOR 42128

ANSWER

Pursuant to 49 C.F.R. § 1111.4 and other applicable law and authority, Defendant Norfolk Southern Railway Company ("NS") respectfully submits this Answer to the Complaint filed by Complainant South Mississippi Electric Power Association ("SMEPA") in STB Docket No. 42128 on December 28, 2011 ("Complaint").

NS denies all of the allegations of the Complaint except where this Answer specifically states otherwise.

In response to the unnumbered paragraphs on page 1 of the Complaint, NS denies that SMEPA has paid or will pay common carrier rates in excess of reasonable maximum levels for NS's transportation of the movements set forth in the Complaint, denies that the Board has jurisdiction over all the issue movements, and denies that SMEPA is entitled to any of the relief it seeks in this proceeding. The remainder of the unnumbered paragraphs consists of a characterization of SMEPA's Complaint, to which no response is required. To the extent that a response is required, NS denies the remaining allegations in the unnumbered paragraphs on page 1.

With respect to the numbered paragraphs of the Complaint, NS responds as follows:

1. NS lacks sufficient information to admit or deny the allegations of Paragraph 1 of the Complaint. To the extent a response is required, NS denies the allegations of Paragraph 1.

2. NS denies that the common carrier rates SMEPA challenges in its Complaint are either “excessive” or “onerous.” NS lacks sufficient information to admit or deny the remaining allegations of Paragraph 2 of the Complaint. To the extent a response is required, NS denies the allegations of Paragraph 2.

3. NS lacks sufficient information to admit or deny the allegations of Paragraph 3 of the Complaint. To the extent a response is required, NS denies the allegations of Paragraph 3.

4. NS admits the first sentence of Paragraph 4 of the Complaint. With respect to the second sentence of Paragraph 4, NS admits that it is generally subject to the Interstate Commerce Commission Termination Act of 1995, and that some of its rates and practices are subject to the jurisdiction of the Board. NS denies the remainder of Paragraph 4.

5. With respect to the allegations in Paragraph 5 of the Complaint, NS admits that several of the Board’s annual determinations of railroad revenue adequacy – determinations that the Board has made clear are based on “essentially mechanical” procedures¹ – have found that NS earned an annual rate of return on net investment higher than the contemporaneous cost of capital for the railroad industry as estimated by the Board. NS further admits that the Board’s most recent revenue adequacy determination found that NS’ net return on investment did not

¹ *Railroad Revenue Adequacy – 2009 Determination*, STB Ex Parte No. 552 (Sub-No. 14), at 1 (Nov. 9, 2010).

exceed the cost of capital for the railroad industry in 2009. The Board's decisions speak for themselves, and NS denies the allegations of Paragraph 5 to the extent they mischaracterize those decisions. NS denies that it is likely to be found "revenue adequate" in the Board's annual revenue adequacy determination for the calendar year 2010; denies that it is or ever has been long-term revenue adequate within the meaning of *Coal Rate Guidelines – Nationwide*, 1 I.C.C.2d 520 (1985) ("*Guidelines*"); denies that Paragraph 5 states a claim on which relief may be granted under the revenue adequacy constraint of the *Guidelines*; and denies that SMEPA is entitled to any damages or relief under that constraint or any other *Guidelines* constraint. To the extent a further response is required, NS denies the remaining allegations of Paragraph 5.

6. With respect to the allegations in Paragraph 6 of the Complaint, NS denies that rail transportation is the only feasible means of delivering coal to SMEPA's Morrow plant from all the origins at issue in the Complaint. NS lacks sufficient information to admit or deny the remaining allegations in Paragraph 6. To the extent a further response is required, NS denies the remaining allegations of Paragraph 6.

7. With respect to the allegations in Paragraph 7 of the Complaint, NS admits that it has delivered coal to the Morrow Generating Station ("Morrow") for several decades and that NS's coal deliveries to Morrow have generally been pursuant to contracts with SMEPA. NS lacks sufficient information to admit or deny SMEPA's allegations that "all" coal consumed at Morrow was transported by NS pursuant to such contracts. NS further admits that its shipments of coal to Morrow typically have used private SMEPA railcars and that NS's most recent rail transportation contract with SMEPA expired on December 31, 2010. To the extent a further response is required, NS denies the remaining allegations of Paragraph 7.

8. With respect to the allegations in Paragraph 8 of the Complaint, NS admits that SMEPA and NS began negotiations on a new contract in 2010 and that those negotiations did not result in a rail transportation contract between the parties. NS lacks sufficient information to admit or deny SMEPA's allegations about its reasons for entering into negotiations and its subjective perceptions regarding negotiations. To the extent a further response is required, NS denies the remaining allegations and characterizations in Paragraph 8.

9. With respect to the allegations of Paragraph 9 of the Complaint, NS admits that on October 8, 2010 SMEPA asked NS to provide SMEPA with rates that would apply to common carrier shipments of coal to Morrow after the December 31, 2010 expiration of the NS-SMEPA contract. NS denies that SMEPA had "no alternatives" available to it when it requested that NS establish common carrier rates for the transportation of coal to the Morrow station. NS lacks sufficient information to admit or deny SMEPA's allegations regarding its subjective motivations for requesting common carrier rates. To the extent a further response is required, NS denies the remaining allegations and characterizations in Paragraph 9.

10. NS admits the allegations of Paragraph 10.

11. NS admits the allegations of Paragraph 11.

12. With respect to the allegations of Paragraph 12, NS denies that SMEPA lacks competitive alternatives to NS's rail transportation service for all of the challenged movements. NS lacks sufficient information to admit or deny the remaining allegations of Paragraph 12 of the Complaint. To the extent a further response is required, NS denies the remaining allegations of Paragraph 12.

13. Paragraph 13 states a legal conclusion to which no response is required. To the extent a response is required, NS denies Paragraph 13.

14. Paragraph 14 states a legal conclusion to which no response is required.

To the extent a response is required, NS states that at this early stage of this case, NS lacks sufficient information to admit or deny SMEPA's allegations regarding revenue-to-variable-cost ratios. To the extent a further response is required, NS denies Paragraph 14.

15. Paragraph 15 states a legal conclusion to which no response is required.

To the extent a response is required, NS denies that it possesses market dominance for all the challenged movements and denies that the Board has rate reasonableness jurisdiction over all the challenged movements.

16. Paragraph 16 states a legal conclusion to which no response is required;.

To the extent a response is necessary, NS denies Paragraph 16.

17. Paragraph 17 states a legal conclusion to which no response is required;.

To the extent a response is necessary, NS denies Paragraph 17.

18. Paragraph 18 states a legal conclusion to which no response is required.

To the extent a response is necessary, NS denies that the challenged rates are excessive or unreasonable under either the stand-alone cost constraint of *Guidelines* or the revenue adequacy constraint of *Guidelines* (which has never been applied by the Board to determine the reasonableness of a railroad's rates and which involves a number of complex questions of first impression for the Board).

19. The allegations of Paragraph 19 fail to identify any particular service term

that SMEPA claims constitutes an unreasonable practice, and as such it fails to advise NS or the Board as to the basis of SMEPA's unreasonable practices claim. As detailed in the Motion to Dismiss NS is filing along with this Answer, this deficient claim falls far short of the applicable

minimum pleading requirements (*e.g.*, 49 C.F.R. § 1111.1) and should be dismissed. To the extent that a response is necessary, NS denies Paragraph 19.


20. Paragraph 20 states a legal conclusion to which no response is required. To the extent a response is necessary, NS denies Paragraph 20.

21. Paragraph 21 states a legal conclusion to which no response is required. To the extent a response is necessary, NS denies Paragraph 21.

The unnumbered final paragraph of the Complaint (on page 9) states legal conclusions and requests for relief to which no response is required. To the extent a response is deemed necessary, NS denies the allegations, conclusions, and requests for relief in that final paragraph, including clauses numbered (1) through (5), and denies that SMEPA is entitled to any of the relief it seeks in this proceeding, or to any other relief.

Respectfully submitted,

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Dated: January 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2011, I caused a copy of the foregoing Answer of Norfolk Southern Railway Company to the Complaint of South Mississippi Electric Power Association to be served on the following parties by first class mail, postage prepaid or more expeditious method of delivery:

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